

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

SEP -8 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:)	2 CA-CV 2007-0146
)	DEPARTMENT A
PATRICIA W. WATSON,)	
)	<u>MEMORANDUM DECISION</u>
Petitioner/Appellant,)	Not for Publication
)	Rule 28, Rules of Civil
and)	Appellate Procedure
)	
ROBERT L. WATSON,)	
)	
Respondent/Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20051509

Honorable Kenneth Lee, Judge

AFFIRMED

Law Offices of Joseph H. Watson
By Joseph H. Watson

Tucson
Attorney for Petitioner/Appellant

P E L A N D E R, Chief Judge.

¶1 In this domestic relations case, appellant Patricia W. Watson appeals from the trial court's decree dissolving her marriage to appellee Robert L. Watson. She contends the

court abused its discretion by failing to award her spousal maintenance pursuant to A.R.S. § 25-319. Finding no error, we affirm.

Background

¶2 The parties were married in 1990. They have one child together, a son who was ten years old at the time of the dissolution. During the marriage, Patricia stayed home and took care of their son while Robert earned the primary income as an engineer.

¶3 In April 2005, Patricia petitioned for legal separation and for an “order to show cause regarding *pendente lite* orders.” The trial court awarded Patricia child support and spousal maintenance, *pendente lite*, finding that Robert was employed at the time and that Patricia’s medical condition prevented her from working.

¶4 After a hearing in December 2005, the trial court later modified the child support and spousal maintenance orders due to “a substantial change of circumstances.” The court found that Robert had lost his job on September 1, 2005, and that “his employment and his psychological and emotional status ha[d] changed.” The court also found that Patricia’s “inability to be self-sufficient” had not changed. Accordingly, the court ordered that neither party was obligated to pay any child support or spousal maintenance to the other as of September 8, 2005.

¶5 After a new judge was assigned to the case, the court held a bench trial in April 2007, at which the parties agreed to have the matter heard as a “Dissolution of Marriage.” In its subsequent decree, the court found that Robert was capable of working and was then earning an annual salary of \$65,000 but that Patricia could not work due to her medical

conditions. The court dissolved the marriage, divided the community assets and debts, awarded sole legal and physical custody of the parties' son to Patricia, ordered Robert to pay \$821 per month in child support, and "in its discretion denie[d] the Request for Spousal Maintenance." Patricia moved to amend the court's findings of fact and conclusions of law and for a new trial. In support of those motions, she averred that she had lived with Robert since 1979 and "supported him financially throughout his education . . . from 1979 through 1989." The court denied both motions, and Patricia appealed.

¶6 Robert has not filed an answering brief. We may regard that failure as a confession of reversible error as to any debatable issue but are not required to do so. *See Gonzales v. Gonzales*, 134 Ariz. 437, 437, 657 P.2d 425, 425 (App. 1982). In our discretion, we proceed to the merits. *See Thompson v. Thompson*, 217 Ariz. 524, n.1, 176 P.3d 722, 724 n.1 (App. 2008).

Discussion

¶7 On appeal, Patricia solely contends the trial court erred by denying her request for spousal maintenance. We review that decision for an abuse of discretion. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 14, 972 P.2d 676, 681 (App. 1998). We "consider the evidence in the light most favorable to the non-appealing party and will sustain the judgment if any reasonable evidence supports it." *In re Marriage of Pownall*, 197 Ariz. 577, ¶ 31, 5 P.3d 911, 917-18 (App. 2000). Additionally, because Patricia has failed to provide us with a transcript of the trial, we presume the missing evidence supports the trial court's findings and conclusions. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995); *Am. Nat'l*

Fire Ins. Co. v. Esquire Labs of Ariz., Inc., 143 Ariz. 512, 520, 522, 694 P.2d 800, 808, 810 (App. 1984); *see also* Ariz. R. Civ. App. P. 11.

¶8 In pertinent part, § 25-319(A) provides:

[T]he court may grant a maintenance order for either spouse for any of the following reasons if it finds that the spouse seeking maintenance:

(1) Lacks sufficient property, including property apportioned to the spouse, to provide for that spouse's reasonable needs.

(2) Is unable to be self-sufficient through appropriate employment or is the custodian of a child whose age or condition is such that the custodian should not be required to seek employment outside the home or lacks earning ability in the labor market adequate to be self-sufficient.

(3) Contributed to the educational opportunities of the other spouse.

(4) Had a marriage of long duration and is of an age that may preclude the possibility of gaining employment adequate to be self-sufficient.

See also Pownall, 197 Ariz. 577, ¶ 32, 5 P.3d at 918; *cf. Porreca v. Porreca*, 8 Ariz. App. 394, 396, 446 P.2d 500, 502 (1968) (in ruling on requests for spousal maintenance, court may consider financial needs of requesting spouse, her ability to receive income, and financial condition of other spouse).

¶9 Patricia maintains she satisfied the first two requirements of § 25-319(A) because she lacks sufficient property to provide for her reasonable needs, is unemployable due to her medical condition, and is the sole custodian of a minor child. Although the trial court found that she was unable to work due to a potentially fatal blood disease, the record

reflects, and the court implicitly found, Patricia did possess sufficient assets at the time of the dissolution. Section 25-319(A)(1) allows the court to consider “property apportioned to the spouse” when determining whether the spouse has sufficient property. Under § 25-319(A), “property” includes “community and separate property awarded to the maintenance-seeking spouse.” *Deatherage v. Deatherage*, 140 Ariz. 317, 320, 681 P.2d 469, 472 (App. 1984). And, although a spouse is not required to “‘use up’ her property,” the court is “required to consider the income potential of . . . property as a factor in determining . . . whether a spouse is entitled to spousal maintenance.” *Id.* at 321, 681 P.2d at 473; *see also Cullum v. Cullum*, 215 Ariz. 352, ¶ 11, 160 P.3d 231, 233 (App. 2007).

¶10 Here, from the parties’ remaining community property that had not already been disposed of, and after offsetting her share of community debts, the trial court awarded the net amount of \$33,094.56 to Patricia. She also received a pick-up truck, worth \$8,000, as well as any bank accounts in her name and any other personal property already in her possession. Additionally, she acknowledges on appeal she had separate property that she used to support herself during the pendency of this action. Without the trial transcript, however, the form and income-producing potential of that property is unknown. We presume that the transcript supports the trial court’s implicit finding that the property had some potential to generate income. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767; *see also Cullum*, 215 Ariz. 352, ¶ 11, 160 P.3d at 233. Based on the trial court’s undisputed property-related findings and awards, and in the absence of the trial transcript, we cannot say no reasonable

evidence supports the court's refusal to award spousal maintenance. *See Pownall*, 197 Ariz. 577, ¶ 31, 5 P.3d at 918; *see also Baker*, 183 Ariz. at 73, 900 P.2d at 767.

¶11 Citing *In re Marriage of Foster*, 125 Ariz. 208, 210-11, 608 P.2d 785, 787-88 (App. 1980), Patricia claims the “award of assets is not a substitute for an award of spousal maintenance.” In *Foster*, the court concluded that the trial court had abused its discretion by awarding the wife a greater share of the community property in lieu of spousal maintenance. *Id.* at 211, 608 P.2d at 788. The trial court did not do that here. Rather, the court equitably divided the community assets and debts between the parties. *See* A.R.S. § 25-318(A). The award to Patricia of \$33,094.56 was not in lieu of spousal maintenance but rather represented her net share of the community property. Therefore, because the trial court merely considered her apportioned property, as it was entitled to do under § 25-319(A)(1), *Foster* does not support her position that the court abused its discretion.

¶12 Next, Patricia contends she was entitled to spousal maintenance because she contributed to Robert's education. *See* § 25-319(A)(3). But she has already received the benefit of Robert's education during their seventeen-year marriage while he worked as an engineer. *See Wisner v. Wisner*, 129 Ariz. 333, 341, 631 P.2d 115, 123 (App. 1981) (factor to consider is extent to which spouse has already benefitted from the other spouse's education). Additionally, as the trial court noted, Robert went to school from 1979 to 1989, before the parties were married in 1990. Patricia cites no authority supporting her position that § 25-319(A)(3) extends to pre-marital contributions and that the court abused its

discretion by failing to consider such contributions to Robert’s education. *See* Ariz. R. Civ. App. P. 13(a)(6).¹

¶13 Lastly, Patricia contends the trial court erred in assessing the parties’ financial resources because after the marriage was dissolved, Robert obtained a job in which he earns \$140,000 annually. She asks us to reverse and remand the case, allowing the trial court to determine whether spousal maintenance should be awarded to her in light of this fact. We cannot consider his alleged new employment, however, because we can only consider evidence that was presented to the trial court and is contained in the record on appeal.² *Thompson v. Ariz. Dep’t of Econ. Sec.*, 127 Ariz. 293, 295, 619 P.2d 1070, 1072 (App. 1980); *Nat’l Adver. Co. v. Ariz. Dep’t of Transp.*, 126 Ariz. 542, 544, 617 P.2d 50, 52 (App. 1980); *see also Marce v. Bailey*, 130 Ariz. 443, 445, 636 P.2d 1225, 1227 (App. 1979) (spousal support “to be determined in the dissolution proceeding on the basis of the status and needs of the parties at the time of the dissolution”). Therefore, based on the record

¹Patricia also maintains that the court erred by failing to apply the factors in § 25-319(B) and that the factors “militate toward the granting of spousal maintenance.” But a court must first consider whether the spouse satisfies § 25-319(A) and is entitled to spousal maintenance under that subsection before determining whether the amount and duration of the award comply with the factors in § 25-319(B). *See Gutierrez*, 193 Ariz. 343, ¶ 15, 972 P.2d at 681; *see also Cullum*, 215 Ariz. 352, ¶¶ 11, 15, 160 P.3d at 233, 234. Therefore, in light of our decision, we need not address the applicability of the subsection B factors here.

²Patricia includes as appendices to her brief various documents, including two affidavits by her counsel, that were prepared and purportedly filed well after the trial court entered the dissolution decree, after the court denied Patricia’s post-decree motions, and after she filed her notice of appeal. But “an appellate court is confined in the determination of a case to what is shown by the record only and cannot consider such extraneous matters.” *West v. Baker*, 109 Ariz. 415, 418-19, 510 P.2d 731, 734-35 (1973); *see also Gorney v. Meaney*, 214 Ariz. 226, n.5, 150 P.3d 799, 804 n.5 (App. 2007).

before us, we cannot say the trial court abused its discretion by denying Patricia spousal maintenance.

Disposition

¶14 The decree of dissolution is affirmed.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge